

Message Text

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FM AMCONSUL RIO DE JANEIRO

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AMCONSUL SAO PAULO

UNCLAS RIO DE JANEIRO 0597

E. O. 11652: N/A

TAGS: EAIR, BR

SUBJ: PANAM REQUEST FOR CHANGE OF GAUGE

REF: STYLES/FERRER TELECON OF FEBRUARY 21, 1975

SUMMARY: PURSUANT TO REFTELCON, CONGEN OFFICER DRAFTED AND DELIVERED AIDE MEMOIRE TO BRIGADEIRO CALDAS SANTOS AT CERNAI ON REF SUBJECT. CONTENTS OF AIDE MEMOIRE WERE DRAWN BASICALLY FROM INSTRUCTIONS CONTAINED IN PREVIOUS DEPARTMENT CABLES. END SUMMARY.

PURSUANT TO REFTELCON, CONGEN OFFICER DRAFTED AND PRESENTED AIDE MEMOIRE TO BRIGADEIRO CALDAS SANTOS LATE AFTERNOON OF FEBRUARY 21, 1975. FOLLOWING IS THE TEXT OF AIDE MEMOIRE:

1. IN ACCORDANCE WITH THE TERMS OF THE AIR TRANSPORT SERVICES AGREEMENT OF 1946 BETWEEN THE UNITED STATES OF AMERICA AND BRAZIL, AS AMENDED, THE 1968 FINAL ACT, AND THE 1958 EXCHANGE OF NOTES, PAN AMERICAN WORLD AIRWAYS ON JANUARY 13, 1975, NOTIFIED THE BRAZILIAN AERONAUTICAL AUTHORITIES OF REVISED SCHEDULES WHICH WILL BECOME EFFECTIVE FEBRUARY 23, 1975. THE GOVERNMENT OF THE UNITED STATES OF AMERICA BELIEVES THAT THE SUBJECT SCHEDULES ARE CONSISTENT WITH THE AGREEMENT CITED ABOVE AND SHOULD

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BE IMPLEMENTED FOR THE FOLLOWING REASONS:

A. SECTION VI OF THE ANNEX TO THE AIR TRANSPORT SERVICES AGREEMENT OF 1946 BETWEEN THE UNITED STATES OF AMERICA AND BRAZIL, SPECIFICALLY PROVIDES THAT THE DESIGNATED CARRIERS MAY, FOR THE ONWARD CARRIAGE OF TRAFFIC, INTRODUCE A DIFFERENT SIZE AIRCRAFT FROM THAT EMPLOYED ON THE EARLIER STAGE OF THE SAME ROUTE. THE GOVERNMENT OF THE UNITED STATES MAINTAINS THAT THIS CLAUSE CLEARLY PROVIDES FOR A "CHANGE OF GAUGE" WHETHER THE ONWARD FLIGHT TERMINATES AT A POINT IN THE COUNTRY WHERE THE SUBSTITUTION OF AIRCRAFT OCCURS OR CONTINUES BEYOND TO A THIRD COUNTRY. INDEED, SECTION VI APPEARS TO HAVE BEEN DRAFTED WITH THE POSSIBILITY IN MIND THAT THE ONWARD FLIGHT WOULD TERMINATE IN THE COUNTRY WHERE THE "CHANGE OF GAUGE" TAKES PLACE. IF THIS POSSIBILITY HAD NOT BEEN ACCEPTED, THE EXPLICIT EXCLUSION OF CABOTAGE TRAFFIC FROM SUCH FLIGHTS WOULD HAVE BEEN UNNECESSARY SINCE THE AGREEMENT, AS STATED IN ITS INTRODUCTION, DEALS ONLY WITH INTERNATIONAL SERVICES.

B. SECTION III OF THE ANNEX TO THE AGREEMENT OF 1946 STATES THAT THE DESIGNATED CARRIERS WILL HAVE COMMERCIAL ENTRY TO ALL AIRPORTS OPEN TO INTERNATIONAL TRAFFIC AT THE POINTS ENUMERATED AND ON EACH OF THE ROUTES SPECIFIED IN THE ROUTE SCHEDULE TO THE AGREEMENT. CONGONHAS AIRPORT IS EVIDENTLY AN INTERNATIONAL AIRPORT IN THAT SEVERAL FOREIGN AIRLINES, AS WELL AS THE BRAZILIAN DESIGNATED CARRIER, OPERATE INTERNATIONAL FLIGHTS INTO AND OUT OF THAT FACILITY. PAN AMERICAN WORLD AIRWAYS TRANSFERRED ITS INTERNATIONAL AIRPORT OPERATIONS FROM CONGONHAS TO VIRACOPOS IN THE BELIEF THAT VIRACOPOS WOULD BE THE EXCLUSIVE INTERNATIONAL AIRPORT FOR SAO PAULO. SINCE INTERNATIONAL SERVICES CONTINUE TO BE OPERATED TO AND FROM CONGONHAS, IT IS THE POSITION OF THE GOVERNMENT OF THE UNITED STATES THAT PAN AMERICAN WORLD AIRWAYS, AS THE DESIGNATED CARRIER, ALSO HAS THE RIGHT OF ACCESS TO SAID AIRPORT.

C. PARAGRAPH 1 OF THE "PROTOCOL OF SIGNATURE" TO THE AGREEMENT OF 1946 PROVIDES THAT THE AIR CARRIERS OF THE CONTRACTING PARTIES SHALL ENJOY "FAIR AND EQUAL OPPORTUNITY" FOR OPERATIONS ON THE ROUTES SPECIFIED IN THE ROUTE SCHEDULE TO THE AGREEMENT. PRESENTLY, THE BRAZILIAN DESIGNATED CARRIER ORIGINATES AND TERMINATES AT CONGONHAS AIRPORT A NUMBER OF ITS INTERNATIONAL

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FLIGHTS TO AND FROM THE UNITED STATES, OPERATED PURSUANT TO THE AGREEMENT. THE BRAZILIAN DESIGNATED CARRIER, THEREFORE, ENJOYS A DISTINCT COMPETITIVE ADVANTAGE IN THAT THE UNITED STATES DESIGNATED CARRIER HAS NOT OFFERED THE SAME SERVICE. THE GOVERNMENT OF THE UNITED STATES OF AMERICA BELIEVES THAT THIS SITUATION VIOLATES BOTH THE AGREEMENT OF 1946 AS WELL AS THE CHICAGO CONVENTION OF 1944.

C. PARAGRAPH 3 OF ANNEX B TO THE 1968 FINAL ACT BETWEEN THE GOVERNMENTS OF THE UNITED STATES AND BRAZIL PROVIDES THAT A SCHEDULE WHICH REFLECTS NO INCREASE IN AN AIRLINE'S TOTAL CAPACITY SHALL BE SUBMITTED BY THE INTERESTED AIRLINE DIRECTLY TO THE AERONAUTICAL AUTHORITIES OF THE OTHER GOVERNMENT "FOR INFORMATION" IN ADVANCE OF THE EFFECTIVE DATE. IN ADDITION, AS REFLECTED IN THE EXCHANGE OF NOTES OF DECEMBER 1, AND DECEMBER 2, 1958, THE BRAZILIAN DELEGATION AGREED THAT THE PRIOR APPROVAL OF SCHEDULES AND THE UNILATERAL IMPOSITION OF FREQUENCY AND CAPACITY CONTROLS WOULD NOT BE ENFORCED BY EITHER COUNTRY EFFECTIVE JULY 1, 1958. THE GOVERNMENT OF THE UNITED STATES BELIEVES THAT THESE PROVISIONS CLEARLY INDICATE THAT NEITHER CONTRACTING PARTY HAS THE UNILATERAL RIGHT TO REJECT THE FILING OF A CHANGE IN SCHEDULE SUBMITTED BY THE DESIGNATED CARRIER OF THE OTHER CONTRACTING PARTY.

2. FOR THE REASONS EXPRESSED ABOVE, THE GOVERNMENT OF THE UNITED STATES OF AMERICA BELIEVES THAT THE SCHEDULE CHANGE NOTIFIED BY THE UNITED STATES DESIGNATED CARRIER TO THE BRAZILIAN AERONAUTICAL AUTHORITIES ON JANUARY 13, 1975, IS CONSISTENT WITH THE PROVISIONS OF THE AIR TRANSPORT SERVICES AGREEMENT AND RELATED UNDERSTANDINGS AND THAT, THEREFORE, THE UNITED STATES DESIGNATED CARRIER HAS THE RIGHT TO INTRODUCE THE SCHEDULE CHANGE AS PLANNED.

3. COMMENTARY FOLLOWS IN SEPTEL.
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